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KALÁPPA v. SHIVÁYA.

The District Judge, however, has apparently assumed that the mortgagee was in default, and has not considered the language of the mortgage-deed, which provides for the mortgagee paying the assessment out of the money derived from cultivating or letting the land, when taken in connection with the special circumstances as alleged by the defendants to have led to the sale by Government. We must, therefore, send down the following issue for a finding :—

"Was the land sold owing to the default of the mortgagee?"

Finding to be transmitted to this Court within three months.

Issue sent down.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Ránade.

1895.
April 8.

TRIMBAK RA'MKRISHNA RA'NADE (ORIGINAL PLAINTIFF), APPELLANT, *v.* LAKSHMAN RA'MKRISHNA RA'NADE (ORIGINAL DEFENDANT), RESPONDENT.*

Jurisdiction—Religious endowment—Property in British India of a temple outside British India—Right to officiate in such temple—Right to share of such property—Partition.

The plaintiff was a member of a family which had the management and received the income of certain property situate in British India belonging to a temple situate at Ashta in the Nizám's territory. Part of the income was devoted to religious services and part to the support of the family. The plaintiff sued to recover by partition his share of the income and for an injunction restraining the defendant from interfering with the plaintiff in celebrating religious worship at the temple when his turn came to officiate. The defendant (his brother) resided at Ashta.

Held, that the right to share in the income followed the devolution of the office and that the Court could not grant the relief prayed for, as the Courts in British India could not execute their decree by putting the plaintiff in possession of his office when his turn came to officiate at the temple which was outside British India.

According to Hindu text-writers as regards public endowments, religious offices are naturally indivisible, though modern custom has sanctioned a departure in respect of allowing the parties entitled to share to officiate by turns and of allowing alienation within certain restrictions.

APPEAL from the decree of Ráo Bahádur G. A. Mánkar, First Class Subordinate Judge at Ahmednagar.

* Appeal No. 143 of 1893.

1895.

TRIMBAK v. LAKSHMAN.

Suit for partition of a share in ancestral lands and villages in the Ahmednagar District and in a *mokas* allowance payable from the Karjat Táluka.

In 1769 one Raghunáth Báwa, an ancestor of the parties, obtained from the Peishwás a grant of the village lands in question for the maintenance of the religious services of the samadhi (sacred tomb) of Hari Náráyan at Ashta. These villages and lands subsequently became British territory and were included in the Ahmednagar District. Ashta was in the territory of the Nizám.

In 1788 A.D., disputes arose among the successors of Raghunáth Báwa, and an arrangement was made by which the income of the property was divided into thirteen equal parts, out of which nine were set apart for the expenses of the samadhi (sacred tomb) and four for the use of Raghunáth Báwá's family. This arrangement was confirmed by the Inám Commission in A.D. 1858.

Raghunáth Báwa, the original acquirer, was succeeded in the management of this property by his son Pandharináth.

Pandharináth had two sons, *viz.*, Hari and Shivrám, and in 1838 the right to officiate at the religious services and the income of the property were equally divided between Hari's branch and Shivrám's branch of the family. The plaintiff and defendant were the grandsons of Hari, and the plaintiff claimed to share equally with the defendant in the half share that had been allotted to Hari. He, therefore, sued for a fourth share of the property.

This suit was filed in 1892. The plaintiff prayed for a partition of his fourth share in the revenue of the inám villages, lands and allowances and for an order that he should be allowed to perform the worship at the tomb at Ashta. He claimed his share in the property which was situate in British India, reserving his right to sue in the Nizám's Courts for his share in such property as was situate in the Nizám's territory.

The defendant denied that the property was partible, and pleaded that he as representing the elder branch of the family was alone entitled to officiate at the religious services.

The First Class Subordinate Judge at Ahmednagar held that the property and the right to officiate were alike divisible, but observed as follows:—

"Though the management of the devasthán at Ashta and the allowance appertaining to it are divisible in enjoyment, yet in the present case no order can be passed in favour of the plaintiff's taking part in the management of the devasthán and the income of the property in dispute, which has been set apart for defraying its expenses, as the devasthan is situate at Ashta in the Nizám's Dominions. Though the property, a portion of whose income has been assigned to the devasthán, is situate in British India, yet the members of the family who receive that part of the income in rotation, that is, the defendant and Gangádhar Shridhar, do so in virtue of their managing the devasthán or on its behalf, and not for their personal enjoyment or use. Consequently the plaintiff's claim to manage the devasthán and to receive the income assigned to it along with the defendant and Gangádhar Shridhar in rotation cannot be allowed. But the same cannot be said of his claim to share in the man's share ($\frac{1}{13}$th). The contention of the defendant that this share is also impartible cannot be sustained."

The Judge, therefore, decreed that the plaintiff should receive a $\frac{1}{13}$th part of the income of the property from year to year.

Against this decision plaintiff appealed, in *formâ pauperis*, to the High Court.

Mahádev Bháskar Chaubal for the appellant (plaintiff):—He cited *Nánábhai* v. *Shriman Goswámi Girdharji* (1); *Shriman Goswámi* v. *Goswámi Shri Girdharlálji* (2); *Manchárám* v. *Prán-shankar* (3); *Ram Coomar Paul* v. *Jogender Nath Paul* (4); West and Bühler (3rd Ed.), p. 785.

Dáji Abáji Khare for the respondent (defendant):—The division made in 1838 does not justify a further division in the absence of any proof of a custom of the family. The services of the devasthán cannot be divided: see *The East Indian Railway Company* v. *The Bengal Coal Company* (5).

Chaubal in reply:—As to the property in Nizám's territory, see *The Advocate General of Bombay* v. *Bái Punjábái* (6).

CANDY, J.:—In this case, the appellant brought his suit against his elder brother, the respondent, for a partition of his $\frac{1}{4}$th share in certain ancestral inám villages and lands in the Jámkhed and

(1) I. L. R., 12 Bom., 331.
(2) I. L. R., 17 Bom., 620.
I. L. R., 6 Bom., 298.
(4) I. L. R., 4 Calc., 56.
(5) I. L. R., 1 Calc., 95.
(6) I. L. R., 18 Bom., 551.

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Karjat tálukas of the Ahmednagar District, and in a *mokas* allowance payable from the Karjat Táluka.

The original ancestor of the parties who acquired the ináms was one Raghunáth Báwa. His son Pandharináth obtained confirmation of the grants. Pandharináth had two sons, Hari and Shivrám. Hari's son, Rámkrishna, was the father of both the appellant and respondent. Deducting the half share which belonged to Shivrám's branch, plaintiff claimed to be entitled to share equally with defendant in Hari's half share.

The plaint claimed four reliefs: (1) a partition of his $\frac{1}{4}$th share; (2) authority to recover the proceeds of his share independently of the respondent; (3) entry of appellant's name in the official papers; and (4) finally, an injunction prohibiting the respondent from interfering with the appellant in the celebration of the worship and *utsav* of the samadhi of Hari Náráyan at Ashta in the Nizám's territory, when the appellant's turn of officiating might arrive under the partition decree. The inám lands and villages were, in fact, acquired by the ancestors of the parties for the purposes of this worship and annual celebrations, and for feeding Bráhmins at the place of the samadhi, which was at Ashta outside British India.

The respondent in his written statement contended that, under an arrangement sanctioned by the Peishwá's Government and confirmed by the Inám Commission, $\frac{9}{13}$th of the income of the lands and villages were set apart for the religious services of the samadhi, and only $\frac{4}{13}$th were left for the support of the family, and that these $\frac{9}{13}$th as well as $\frac{4}{13}$th were not partible property. It was further urged that even if partition were allowed, the appellant's share was $\frac{1}{39}$th, and not $\frac{1}{4}$th of the whole, and it was burdened with liability for common debts. Lastly, it was contended, in respect of the appellant's claim for worship, that the respondent, as representing the elder branch of the family, was alone entitled to officiate at the religious services. It is not necessary to notice the other defences here.

The lower Court held that the appellant was only entitled to a $\frac{1}{13}$th share of the income of the property, as $\frac{9}{13}$th share was set

apart for devasthán services, and out of $\frac{4}{13}$th set apart for family support, $\frac{2}{13}$th belonged to the other eight annas' branch, and $\frac{2}{13}$th were equally divisible between the parties to this suit. Appellant's claim to share in the $\frac{9}{13}$th of the devasthán income, together with the claim for the injunction sought by him, were disallowed, and appellant was directed to recover his $\frac{1}{13}$th share of the income; subject to a liability to pay a similar proportion of the ancestral debts which might be proved in execution proceedings. The claim for partition by metes and bounds was disallowed, as also the prayer for the entry of appellant's name in the village papers.

The lower Court held that although the devasthán income in this case and the right of officiating at the samadhi at Ashta were divisible, no order could be made in regard to the same, as Ashta was outside British India, and the income was received by the respondent, not for his personal enjoyment, but on account of the services rendered at the samadhi.

In the appeal before us, Mr. Chaubal took exception to the rejection of the claim in respect of the devasthán services and the property assigned for its use, and the principal point for inquiry is, whether the $\frac{9}{13}$th share of the income set apart for devasthán services, together with the right to officiate by turns at the samádhi, could properly be included in the property in which the appellant had a right to share equally with the respondent in this case.

The appellant rests his case mainly on the finding of the lower Court that the devasthán property and the right of officiating at the samadhi by rotation, were divisible, and that, as a matter of fact, both these had been divided between the representatives of the two eight-annas' sharers. It was urged that the fact of the devasthán at Ashta being in foreign territory made no difference, because the property sought to be divided was admittedly within the jurisdiction, and the following authorities were cited in support of this contention:—*Nánábhái* v. *Shriman Goswámi Girdharji*[1]; *Shriman Goswámi* v. *Goswámi Shri Girdharláljí*[2]; *The Advocate General of Bombay* v. *Bái Punjábái*[3]. None of

(1) I. L. R., 12 Bom., 331. (2) I. L. R., 17 Bom., 620.

(3) I. L. R., 18 Bom., 551.

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these cases appear to us, however, to be in point. It is plain that the Courts in British India cannot execute their decree in respect of placing the appellant in possession of his year of office at Ashta when the turn came for him to officiate at the samadhi. The respondent himself lives out of British India at Ashta, and the personal remedy also would not prove effective. If the relief in respect of the permanent injunction asked for could not be granted for the reasons stated above, it is clear that the right to recover the income of the devasthán share for his year of office, which was only ancillary to the principal right, could not be also enforced. The case of *Shriman Goswámi* v. *Goswámi Shri Girdharlálji*(1) can be distinguished by the fact that the house, in respect of which relief was sought there, was within the jurisdiction, and the Court was thus only called upon to confirm the old Goswámi Maháráj in possession, and it held that it was not bound to recognize the act of deposition ordered by a foreign state. The decision in *Nánabhái* v. *Shriman Goswámi Girdharlálji*(2) is also not in point, as it simply decided that the act of a foreign ruler could not deprive a party in possession of property in British India of his rights, unless they were adjudicated upon by competent authority here. The effect of these decisions is thus to negative rather than help the claim set up for appellant that the Courts in British India can make valid orders about the right to officiate in a temple outside British India. The cases of *Ram Coomar Paul* v. *Jogender Nath Paul*(3) and *Mancharám* v. *Pránshankar*(4) are more akin to the present case, but they can be distinguished in that the temples and idols, the rights in regard to which were in dispute, were within the jurisdiction of the Courts which decided those cases. The same remark holds good in respect of the decision in *Sonatun Bysack* v. *Juggut Soondree Dossee*(5).

The larger question of the partibility or otherwise of such property, when expressly set apart for religious worship, need not, therefore, be considered in this case. We may, however, note that in *Rupa Jagshet* v. *Krishnáji Govind*(6), Sargent, C. J., held

(1) I. L. R., 17 Bom., 620.
(2) I. L. R., 12 Bom., 331.
(3) I. L. R., 4 Calc., 56.
(4) I. L. R., 6 Bom., 298.
(5) 8 Moore's I. A., 66.
(6) I. L. R., 9 Bom., 169.

that the Hindu law was in this respect different from English law, which distinguished private from public endowments, and that the sale in execution of such property was void, and might be set aside by the judgment-debtor himself. This position was also upheld in *Náráyan* v. *Chintáman*[1]. Melvill, J., in deciding *Manchárám* v. *Pránshankar*[2] held that these offices were in general inalienable, and that according to the Hindu text-writers, religious offices are naturally indivisible, though modern custom has sanctioned a departure in respect of allowing the parties entitled to share to officiate by turns, and of allowing alienation within certain restrictions. The rulings in *Ram Coomar Paul* v. *Jogendar Nath Paul*[3] and *Radha Mohun Mundul* v. *Jadoomonee Dossee*[4] and the remarks made by Mayne in paragraphs 307, 308 must be understood in regard to this growth of customary law regulating private endowments. In the present case, however, the endowment is a public endowment, being a gift made by the former rulers of the country, and confirmed by the British Government. Both the Peishwa's grant and the confirmation expressly set forth the charitable and religious purposes for which the endowment was made in 1769 and 1788, and confirmed in 1858.

All doubts about the public character of the endowment, which might arise from the ambiguous language of the first grant of 1769, were removed by the subsequent decision of 1788, when a clear line was drawn between the devasthán share and the share set apart for the family. The person, who raised the dispute in 1788, was not recognized to have any rights to manage the devasthán, and in fact down to 1838, when the representative of the eight annas' share obtained a division of the office, as well as of the income, there was no division of the office. The circumstances attending that division are set forth in Exhibits Nos. 23 and 24, but they furnish no grounds for recognizing that the family arrangement made in 1838 changed the nature of the grant. See also *Appasami* v. *Nagappa*[5]. It is clear that if the present claim of the appellant were recognized, each of the

(1) I. L. R., 5 Bom., 393.
(2) I. L. R., 6 Bom., 298.
(3) I. L. R., 4 Calc., 56.
(4) 23 W. R., 369.
(5) I. L. R., 7 Mad., 499.

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sons of the parties—and they have many—might claim a share, not only in the family share, but in the devasthán share and office also, and this process might go on with each generation, frittering away the income, and making the service wholly ineffective. The lower Court appears to have assumed, without any such evidence as is suggested in *Mohunt Rumun Dass* v. *Mohunt Ashbul Dass*[1], that the office is partible with the income. The practice of many generations of the parties must be considered in settling the questions of impartibility, and that practice is in this case against partition with the one single exception of what took place in 1838. It is, however, not necessary to discuss this question further in this place. The relief by way of injunction was plainly one which the lower Court was not in a position to grant effectively, and the right to share in the devasthán income naturally follows the devolution of the office.

We accordingly confirm the decree of the lower Court, and reject the appeal, with costs on appellant.

The appellant should pay the Court-fees which he would have had to pay if he had not been permitted to appeal as a pauper.

Decree confirmed.

(1) 1 Cal. W. R., 160.

CRIMINAL REVISION.

Before Mr. Justice Candy and Mr. Justice Ránade.

1895.
April 8.

IN RE P. A. RODRIGUES.*

Criminal Procedure Code (Act X of 1882), Sec. 555—Disqualification of a Magistrate—Pecuniary interest.

The accused was a compounder in the employ of Treacher & Co. He was tried and convicted by the Presidency Magistrate of criminal breach of trust as a servant in respect of certain goods belonging to the company. It appeared that the Magistrate was a shareholder in the company which prosecuted the accused.

Held, that the Magistrate was disqualified from trying the case. As a shareholder of the company he had a pecuniary interest, however small, in the result of the accusation, and was, therefore, "personally interested" in the case within the meaning of section 555 of the Code of Criminal Procedure (Act X of 1882).

* Criminal Application for Revision, No. 50 of 1895.